Filed 1/3/19 P. v. Herring CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

THE PEOPLE, Plaintiff and Respondent, v. BRETT DARREN HERRING, Defendant and Appellant.	C083892 (Super. Ct. No. LODCRFE20160001039)

After defendant Brett Darren Herring stole a loaded trailer, a jury found him guilty of grand theft, vehicle theft, and possession of burglary tools. On appeal, he contends: (1) as to the grand theft count, the trial court erred in failing to instruct the jury that the value of the stolen property is calculated by its fair market value; and (2) as to the vehicle theft count, the court erred in failing to instruct the jury that the vehicles' value must exceed $950. We affirm.

BACKGROUND

The victims came to California from Nebraska in 2015 and brought their trailer with them. In January 2016, defendant stole the trailer and its contents. He was quickly apprehended.

When it was stolen, the trailer housed a motorcycle, a TV, a TV stand, a tool box and tools, a bag of clothes, and a mattress. The victims had paid $5,600 for the trailer in 2011. When recovered, the trailer's sheet metal was damaged, but that damage was not there before it was stolen.

The motorcycle was a working 1982 Suzuki 550. The victims had paid $2,500 for it in 2012. One of the victims had kept it as a memory of his father and had "fixed it and everything."

As to the other items in the trailer, the victims had paid $300 for the mattress, $500 for the TV, $250 for the tool box, $600 for the TV stand, and various amounts for the clothes.

A jury found defendant guilty of grand theft, vehicle theft, and possession of burglary tools. The trial court imposed an eight-year aggregate term.

DISCUSSION

I

Defendant's Challenge To The Grand Theft Instruction

As to the grand theft conviction, defendant first contends the trial court erred in failing to instruct the jury that the value of the stolen property is its fair market value at the time of, and general location of, the theft. The People respond that defendant has forfeited the challenge by failing to object below. We agree with the People.

The jury was instructed on the elements of grand theft with a modified version of CALCRIM No. 1800.[1] The instruction was modified to include, as an element, that the stolen property must be worth more than $950. Before instructing the jury, the trial court noted there had been an informal jury instruction conference. The court listed the instructions that would be given, including the modified version of CALCRIM No. 1800.

Defendant maintains the trial court should have instructed the jury with CALCRIM No. 1801, which provides in pertinent part: "If you conclude that the defendant committed a theft, you must decide whether the crime was grand theft or petty theft. [¶] . . . [¶] [The defendant committed grand theft if the value of the property . . . is more than $950.] [¶] . . . [¶] [The value of (property . . .) is the fair (market value of the property. . . .)] [¶] . . . [¶] [*Fair market value* is the highest price the property would reasonably have been sold for in the open market at the time of, and in the general location of, the theft.]" Defendant adds that the bench notes for CALCRIM No. 1801 provide: "The court has a **sua sponte** duty to give an instruction if grand theft has been charged."[2]

We agree with the People that defendant has forfeited his challenge by failing to object to the instruction below. (See *People v. Virgil* (2011) 51 Cal.4th 1210, 1260;

---

[1] In pertinent part, the court instructed with CALCRIM No. 1800: "To prove the defendant is guilty of this crime [grand theft], the People must prove that: One, the defendant took possession of property owned by someone else; two, the defendant took the property without the owner's or owner's agent's consent; three, when the defendant took the property he intended to deprive the owner of it permanently or remove it from the owner's or owner's agent's possession for so extended a period of time that the owner would be deprived of a major portion of the value or enjoyment of the property; four, the defendant moved the property even a small distance and kept it for any period of time however brief; and five, the value of the property taken was worth more than $950."

[2] The bench notes for CALCRIM No. 1800 similarly provide, "If the defendant is also charged with grand theft, give CALCRIM No. 1801."

People v. Battle (2011) 198 Cal.App.4th 50, 64 [" 'Failure to object to instructional error forfeits the issue on appeal unless the error affects defendant's substantial rights' "].)

Defendant nevertheless maintains his challenge is preserved because the instruction given was an incorrect statement of the law. (See *People v. Hudson* (2006) 38 Cal.4th 1002, 1012 [forfeiture does not apply when an instruction is an incorrect statement of the law].) He reasons that the error concerned an element of grand theft: how the value of the property must be calculated. He is mistaken.

How the value of stolen property is calculated is not an element of the offense. (See *People v. Whitmer* (2014) 230 Cal.App.4th 906, 922-923 [The elements of grand theft are the taking into possession of property, valued at more than statutory amount, from the owner without consent, and its asportation with intent to deprive].) That the value exceeds $950 is an element, but the modified instruction so informed the jury.

The defense could have requested an instruction on calculating the value of the stolen property -- that it did not do so forfeits the challenge on appeal.[3]

II

Defendant's Challenge To The Vehicle Theft Instruction

As to the felony vehicle theft conviction, defendant contends the trial court erred in failing to instruct the jury that the vehicles' value must exceed $950, as calculated by the fair market value. The People concede error but maintain it was harmless. We agree with the People.

As to the vehicle theft count, the trial court instructed the jury on the elements of the offense, but failed to instruct that a felony vehicle theft conviction requires the

---

3 Given one of the victims testified to spending a combined $9,750 on the property (not including the clothing and tools), it is not surprising defense counsel did not request an instruction on calculating present value.

vehicle be worth more than $950.[4] This was error. Following Proposition 47, a felony conviction for vehicle theft requires that the stolen vehicle's value exceeds $950. (*People v. Page* (2017) 3 Cal.5th 1175, 1183.) Thus, failing to instruct the jury regarding the $950 element was error. Nevertheless, that error was harmless under any standard of prejudice. (See *People v. Wilkins* (2013) 56 Cal.4th 333, 348 ["When the jury is 'misinstructed on an element of the offense . . . reversal . . . is required unless we are able to conclude that the error was harmless beyond a reasonable doubt' "].)

The record gives nothing to doubt that the combined value of the trailer and motorcycle exceeded $950. The motorcycle, a 1982 Suzuki 550, was purchased in 2012 for $2,500. Thus, at 30 years old, it retained $2,500 in value. And since that time, the victim had "fixed it and everything" and kept it as a memory of his father. Nothing indicates the motorcycle's value had diminished below $950 in the four years the victims owed it.

Further, the motorcycle's value is added to the trailer's value, which was bought five years before it was stolen, for $5,600. Though it is damaged, the damage was not there when defendant stole it.

In sum, it requires too far a stretch of the imagination to conclude a properly instructed jury could find the trailer and the motorcycle's combined value had plummeted below $950 at the time they were stolen. Accordingly, the error in failing to instruct the jury that their value must exceed $950 was harmless beyond a reasonable doubt.

---

[4] In pertinent part, the court instructed: "To prove that the defendant is guilty of this crime [vehicle theft], the People must prove that: One, the defendant took or drove someone else's vehicle without the owner's consent; and two, when the defendant did so, he intended to deprive the owner of possession or ownership of the vehicle for any period of time. [¶] A taking requires that the vehicle be moved for any distance, no matter how small. [¶] A vehicle includes a motorcycle or trailer."

DISPOSITION

The judgment is affirmed.

/s/
Robie, J.

We concur:

/s/
Raye, P. J.

/s/
Blease, J.